

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EDWARD A. PRECIADO-NUNO,

Petitioner,

v.

E.K. MCDANIEL, et al.,

Respondents.

Case No. 3:19-cv-00103-HDM-WGC

ORDER

This is a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by a Nevada state prisoner. The respondents have filed a motion to dismiss (ECF No. 15). The petitioner has opposed (ECF No. 24), and the respondents have replied (ECF No. 25).

The petitioner challenges his 2011 state court conviction for voluntary manslaughter with use of a deadly weapon. (Ex. 86).¹ He initiated this action in February 2019 with the filing of a federal habeas petition asserting sixteen grounds for relief. (ECF No. 7). The respondents now move to dismiss Ground 1, in part, Ground 8, in part, Ground 9, and Ground 10 as redundant, conclusory and/or non-cognizable.

I. Ground 1

In Ground 1, the petitioner asserts that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated because the trial judge was biased against him and in favor of the State and the police. (ECF No. 7 at 5-6). Specifically, while the trial judge recused from other cases involving the petitioner's

¹ The exhibits cited in this order, comprising the relevant state court record, are located at ECF Nos. 16-21 and 23.

1 attorney, the judge failed to do so in the petitioner's case. The
2 petitioner asserts that the judge's bias was evident when he
3 improperly: (1) sentenced the petitioner to the maximum possible
4 sentence; (2) made statements and rulings during voir dire that
5 forced the petitioner to use peremptory strikes against jurors
6 that should have been removed for cause; (3) protected the State
7 by limiting cross examination of Detective Acosta and Officer
8 Proietto; (4) told a juror that he believed the petitioner had
9 beaten the decedent while she was unconscious; and (5) refused to
10 let the petitioner's psychiatric expert testify. (*Id.*)

11 The respondents understand Ground 1 as setting forth five
12 separate sub-claims, with the first asserting that the trial court
13 was biased in favor of the State and police - a claim the
14 respondents argue is conclusory.² The court does not agree with
15 this construction. Rather, Ground 1 alleges that the trial court
16 was biased, and what respondents identify as sub-claims are the
17 specific actions the petitioner points to substantiate his claim
18 of bias. They are not standalone claims themselves.

19 This conclusion is bolstered by the fact that each of the
20 discrete allegations of bias is the subject itself of a standalone
21 claim elsewhere in the petition. What respondents refer to as
22 Ground 1(B) is asserted in Ground 2; what respondents refer to as
23 Ground 1(C) is asserted in Ground 3; and what respondents refer to
24 as Ground 1(E) appears to be asserted in Ground 8(2). Further, the
25 allegation that the court improperly limited cross-examination
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27 ² Respondents also fail to acknowledge the petitioner's allegation
28 regarding the limitation of cross-examination of Acosta and Proietto.

1 appears in Ground 8(1) and 8(4), and the allegation that the court
2 improperly suggested to the jury that the victim was unconscious
3 appears in Ground 8(3).

4 It is true that the standalone claims also assert that the
5 improper actions were fueled by the trial court's bias, which does
6 create some redundancy in the petition. However, Ground 1 is based
7 on an assertion that a prior relationship between the petitioner's
8 attorney and the trial judge created the alleged bias, and this
9 allegation is not contained within the other standalone claims.
10 It therefore makes sense to evaluate Ground 1 independently,
11 despite any redundancies. The court will not therefore dismiss
12 Ground 1 as redundant.

13 Ground 1 is further not conclusory, as the claim itself,
14 particularly when considered in the context of all the claims in
15 the petition, alleges sufficient facts to state a claim.

16 The motion to dismiss Ground One in part will therefore be
17 denied.

18 **II. Ground 8**

19 In Ground 8, the petitioner asserts that the trial court made
20 several erroneous evidentiary and other rulings that violated his
21 Fifth, Sixth and Fourteenth Amendment rights to due process, fair
22 trial and to confront the witnesses against him. (ECF NO. 7 at 30-
23 38). The respondents assert that Grounds 8(1), (2) and (4) assert
24 claims of state law that are not cognizable on federal habeas
25 review and should therefore be dismissed.³

27 ³ The respondents refer to these sub-claims by letter; however, because the
28 petitioner uses numbers, the court will employ the numbering in the petition
itself.

1 Ground 8(1) asserts that that the trial court improperly
2 restricted petitioner's ability to cross-examine Detective Acosta.
3 (ECF No. 7 at 30-33). Ground 8(2) asserts that the trial court
4 improperly limited Dr. Roitman's testimony. (*Id.* at 33-34). And
5 Ground 8(4) asserts that the petitioner's due process rights were
6 violated by the court's refusal to allow defense counsel to cross
7 examine CSA Proietto as to Holstein's bloodstain pattern
8 examination report. (*Id.* at 36-37).

9 Although all three claims are framed as violations of federal
10 law, the respondents assert that their only real complaint is one
11 of state law, and violations of state law are not a cognizable
12 basis for federal habeas relief. However, while a violation of
13 state law will not, standing alone, violate due process, it may
14 rise to the level of a due process violation if it renders the
15 petitioner's trial fundamentally unfair. See *Estelle v. McGuire*,
16 502 U.S. 62, 67 (1991). Further, a state court's ruling limiting
17 or excluding cross-examination can violate the Confrontation
18 Clause under some circumstances. See *Delaware v. Van Arsdall*, 475
19 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 318 (1974);
20 *United States v. Larson*, 495 F.3d 1094, 1102 (9th Cir. 2007).
21 Whether the violations in this case rose to the level of a
22 violation of due process or the right to confront witnesses are
23 not questions that should be resolved on a motion to dismiss. The
24 motion to dismiss part of Ground 8 as non-cognizable will therefore
25 be denied.

26 **III. Ground 9**

27 In Ground 9, the petitioner alleges that the state district
28 court's failure to record bench conferences and other proceedings

1 deprived him of his rights to due process and a fair trial as
2 guaranteed by the Fifth, Sixth and Fourteenth Amendments. (ECF No.
3 7 at 40-42). In particular, he asserts that the absence of a record
4 of the bench conferences and proceedings conducted *in camera*
5 precluded him from obtaining meaningful review on direct appeal.
6 (See *id.*)

7 The respondents move to dismiss Ground 9 on the grounds that
8 at the time of the petitioner's trial, there was no duty under
9 state law to record bench conferences, so the petitioner's rights
10 could not have been violated by the absence of such records. The
11 respondents' argument goes to the merits of Ground 9, and because
12 the lack of any state duty is not dispositive of whether the
13 petitioner's federal constitutional rights were violated, this
14 question is not appropriately resolved on a motion to dismiss.

15 To the extent the respondents argue Ground 9 should be
16 dismissed as it presents only a state law issue, the argument is
17 without merit for the reasons set forth with respect to Ground 8.

18 The motion to dismiss Ground 9 will therefore be denied.

19 **IV. Ground 10**

20 In Ground 10, the petitioner asserts that his due process
21 rights were violated because the trial court refused to correct
22 errors in the presentence investigation report. (ECF No. 7 at 44-
23 45).

24 The respondents assert first that the basis of this claim is
25 fabricated as the record shows the petitioner never made any
26 request to correct the PSI report. This argument goes to the merits
27 of the petitioner's claim and is not appropriately resolved on a
28 motion to dismiss.

1 The respondents next assert that this claim raises an issue
2 of state law and is therefore not cognizable on federal habeas
3 review. For the reasons set forth above with respect to Ground 8,
4 this argument is also without merit.

5 The motion to dismiss Ground 10 will therefore be denied.

6 **Conclusion**

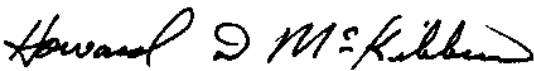
7 In accordance with the foregoing, IT IS THEREFORE ORDERED
8 that the respondents' motion to dismiss (ECF No. 15) is DENIED.

9 IT IS FURTHER ORDERED that respondents shall file an answer
10 to all remaining claims in the petition on or before July 27, 2020.
11 The answer must include substantive arguments on the merits as to
12 each ground in the petition. In filing the answer, respondents
13 must comply with the requirements of Rule 5 of the Rules Governing
14 Section 2254 Cases in the United States District Courts and shall
15 specifically cite to and address the applicable state court written
16 decision and state court record materials, if any, regarding each
17 claim within the response as to that claim.

18 IT IS FURTHER ORDERED that the petitioner may file a reply on
19 or before August 26, 2020.

20 IT IS SO ORDERED.

21 DATED: This 26th day of May, 2020.

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24 UNITED STATES DISTRICT JUDGE
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